92-901

No. _____

Supreme Court, U.S.
FILED
NOV 25 1992
OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1992

WILLIAM JAY LOUWSMA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

STEPHEN K. JOHNSON
Attorney at Law
P.O. Box 5279
Gainesville, Florida 32602
(904) 376-3297

Counsel of Record

EMMETT M. DONNELLY
Attorney at Law
400 Southgate Office Plaza
5001 West 80th Street
Bloomington, Minnesota 55437
(612) 835-6300

1992-EXECUTEAM / LAW DIV., 2595 N. Hamline Ave., St. Paul, MN 55113 • 612/633-1443 • 800/747-8793

QUESTIONS PRESENTED

Does 28 U.S.C. Sec. 89 in conjunction with 18 U.S.C. Sec. 3240 permit the Middle District of Florida to prosecute an offense which was committed in Collier County, Florida, at a time when that county was part of the Southern District of Florida?

Does the "previously ascertained by law" clause of the Sixth Amendment of the United States Constitution require a federal judicial redistricting scheme to prosecute offenses in the district where the offense was committed rather than a new district as drawn after the offense?

PARTIES

The United States of America was represented by Russell C. Stoddard, Assistant United States Attorney for the Middle District of Florida, in the district and circuit court proceedings.

Mr. William Jay Louwsma, the Petitioner, was represented by Stephen K. Johnson, Esq., Gainesville, Florida, in the district and circuit court proceedings.

TABLE OF CONTENTS

Questions Presented..... i

Parties..... ii

Table of Contents..... iii

Table of Authorities..... v

Petition..... 1

Opinions Below..... 2

Statement of Jurisdictional Grounds..... 2

Constitutional Provisions..... 3

Statement of the Case..... 3

Reasons for Granting the Writ

I. The Eleventh Circuit Court of Appeal has decided an important question of federal constitutional law which has not been, but needs to be, decided by this Court to define the parameters of the previously ascertained by law clause of the Sixth Amendment to the United States Constitution.
..... 9

I. The Eleventh Circuit Court of Appeals has decided an important question of federal statutory law in a manner which conflicts with longstanding precedent and which has not been, but should be decided by this Court.
..... 15

Conclusion..... 27

APPENDIX INDEX

Appendix A: Opinion of the Eleventh Circuit

Appendix B: Opinion of the Middle District

Appendix C: Statutory provisions

TABLE OF AUTHORITIES

Briggs v. White, 32 F.2d 108 (8th Cir. 1929)..... 19

Hayes v. United States, 407 F.2d 189 (5th Cir. 1969)..... 18

Lewis v. United States, 279 U.S. 63, 49 S.Ct. 257, 73 L.Ed. 615 (1929) 17, 18

Mizzell v. Beard, 25 F.2d 324 (N.D.Okla. 1928) 12, 13, 18, 23, 24

Mizzell v. Vickery, 36 F.2d 327 (10th Cir. 1929)..... 18

Radzanower v. Touche Ross and Company, 426 U.S. 148, 48 L.Ed.2d 540, 96 S.Ct. 1989 (1979)..... 20

St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 101 S.Ct. 2142, 68 L.Ed.2d 612 (1981) 23

United States v. Hackett, 29 F. 848 (Cir.Ct.N.D.Cal. 1887) 12, 13, 19, 24, 25

Westover v. United States, 394 F.2d 164 (9th Cir. 1968)..... 19

Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1983, 26 L.Ed.2d 446 (1970) 11

Zicarelli v. Dietz, 633 F.2d 312, (3rd Cir. 1980), cert. denied, 449 U.S. 1083, 101 S.Ct. 868, 66 L.Ed.2d 807 (1981) 12, 14

Constitutional Provisions, Statutes and Rules

Sixth Amendment, U.S. Constitution 3, 5, 9

18 U.S.C. Section 3240 (1992) 5, 6, 8, 15, 16, 17, 18, 19, 20, 22

28 U.S.C. Section 89 (1992) 5, 6, 8, 15, 16, 19, 20, 22, 25

28 U.S.C. Section 1257(a) (1992)..... 2

Judicial Code Section 59 (1911) (36 Stat. L. 1103)..... 17

Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, Tit. X, Sec. 1021, 102 Stat. 4642, 4672 (1989)..... 5, 6, 20

Sup.Ct.Rule 13 (1991)..... 2

Other Authority

H.R. 4452, 100th Cong., 2d Sess. (1988)..... 21

Report of the Special Joint Committee on Revision and Codification of Laws of the United States, S.Rep.No. 388, 61st Cong. 2d Sess. 1 (1910)..... 22

S. 2340, 100th Cong., 2d Sess. (1988)..... 21

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

WILLIAM JAY LOUWSMA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT OF APPEALS

William Jay Louwsma respectfully petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on September 2, 1992.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals, reproduced and attached as Appendix A, is reported at 970 F.2d 797 (11th Cir. 1992). The opinion of the United States District Court for the Middle District of Florida, reproduced and attached as Appendix B, is unreported.

STATEMENT OF JURISDICTIONAL GROUNDS

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on September 2, 1992. This petition for writ of certiorari was filed within ninety days of the Eleventh Circuit's decision. See Sup.Ct.R. 13 (1991). The jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 1254 (1992).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

STATEMENT OF THE CASE

On August 2, 1990, the Government filed a Second Superseding Indictment charging the Petitioner and approximately 28 others with various narcotics offenses in violation of Title 21, United States Code. The Government alleged that the

offenses were perpetrated in the Middle District of Florida and elsewhere no later than April 1986 (R-1-44-5[1]).

The issue presented is whether the Middle District, rather than the Southern District, had jurisdiction to try the alleged offenses. According to the Government, the offenses were allegedly committed in Collier County, Florida in an area known as "Dupont" on Chokoloskee Island near Everglades City, Florida (R-1-208-2). Petitioner and the other defendants were allegedly responsible for transporting marijuana through Collier County and across the Florida Peninsula to be distributed to other members of the conspiracy in Fort Lauderdale, Florida (R-1-208-2). No evidence was ever

[1] "R" refers to a citation from the Record on Appeal.

alleged or produced which would indicate that an overt act was committed in any part of the Middle District of Florida other than Collier County.

Petitioner sought to dismiss the prosecution in the Middle District citing violations of Title 18 U.S.C. Sec. 3240 and the Sixth Amendment of the United States Constitution (R-1-204-1). The offenses were allegedly perpetrated in Collier County, Florida at a time when Collier County was within the jurisdiction of the Southern District of Florida rather than the Middle District of Florida (R-1-204-2-3). Effective February 18, 1989, the United States Congress changed the composition of the Southern and Middle Districts of Florida by amending Title 28 U.S.C. Section 89 in Public Law 100-702 to transfer Collier,

Glades and Hendry Counties from the old Southern District to the new Middle District. See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, Tit. X, Sec. 1021, 102 Stat. 4642, 4672 (1989). Petitioner's alleged offense occurred prior to this redistricting.

Petitioner contends that the Middle District lacked jurisdiction to try the offense charged in this case because 18 U.S.C. Sec. 3240 provides that prosecutions for crimes occurring before the effective date of a change in judicial districts should be commenced as if the change had not taken place. In opposition, the Government argued that the amendments to 28 U.S.C. Section 89 clearly expressed the intent of Congress to require the redistricting plan to

apply to all actions commenced after the effective date regardless of when the crime was committed (R-1-208-7). Petitioner also contended that the "previously ascertained by law" clause of the Sixth Amendment prohibited Petitioner from being prosecuted in any district other than the one where the crime was committed.

The trial court denied Petitioner's Motion to Dismiss. See Appendix B. Petitioner then pleaded guilty to one count, reserving the right to appeal. District Judge Gagliardi released Petitioner on bond pending appeal. After ordering Oral Argument sua sponte, the Eleventh Circuit Court of Appeals affirmed the trial court's action in a written opinion which addressed the statutory and Sixth Amendment issues.

See Appendix A. The Eleventh Circuit essentially held that the amendments to 28 U.S.C. Sec. 89 impliedly repealed 18 U.S.C. Sec. 3240 with respect to the Florida redistricting. In addressing the Sixth Amendment, the Court of Appeals found that proceeding in the Middle District more fully protected Petitioner's right to trial by jury because the county in which his crime was committed was in the newly constituted Middle District. See Appendix A.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT NEEDS TO BE, DECIDED BY THIS COURT TO DEFINE THE PARAMETERS OF THE AS PREVIOUSLY ASCERTAINED BY LAW CLAUSE OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Eleventh Circuit Court of Appeals misinterpreted the "as previously ascertained by law" clause of the Sixth Amendment to the United States Constitution in this case by permitting the Petitioner to be prosecuted in a district where the offense did not occur. See Appendix A-5-7. As the population grows and shifts throughout the United States, Congress and the Federal Courts will have a continuing concern for efficient allocation of judicial resources. Inevitably, redistricting

efforts will be forced to confront both constitutional and statutory restrictions. Certiorari review is necessary in this case to clarify at least the Constitutional guidelines for federal redistricting and to prevent future jurisdictional conflicts and litigation.

The Eleventh Circuit held that Petitioner's Sixth Amendment rights were not violated by allowing the instant case to be prosecuted in the Middle District of Florida even though the situs of the prosecution would have been the Southern District of Florida at the time the offense was committed. The appellate court reasoned that the Petitioner's right to trial by a jury from his community was more fully protected in the Middle District because the jury pool

would have been drawn more heavily from southwest Florida rather than southeast Florida.[2] See Appendix A-7. However, Petitioner contends that a plain reading of the "as previously ascertained" clause prohibits Congress or the Federal Courts from changing the situs of the prosecution after the offense has already been committed.

This Court has yet to rule on the meaning of the "as previously ascertained" clause. Indeed, the

[2] The Eleventh Circuit traced the history of the Sixth Amendment to James Madison's proposal that the Sixth Amendment guarantee a right to trial by jury of the "vicinage," which meant a jury of the neighborhood. The framers rejected "vicinage" as too vague and opted for "district" which provided both flexibility and certainty. See Williams v. Florida, 399 U.S. 78, 94, 90 S.Ct. 1983, 1902-3, 26 L.Ed.2d 446 (1970) (quoting 1 Annals of Cong. 435 (1789)).

constitutional and case law history of the provision is so sparse that Petitioner appears to present a case of first impression. In Zicarelli v. Dietz, 633 F.2d 312 (3rd Cir. 1980), cert. denied, 449 U.S. 1083, 101 S.Ct. 868, 66 L.Ed.2d 807 (1981), the Third Circuit postulated that the clause was intended to preclude Congress from reformulating the judicial districts to affect a criminal case after the offense was committed. Zicarelli at 323. Additionally, Mizzell v. Beard, 25 F.2d 324 (N.D.Okla. 1928) and United States v. Hackett, 29 F. 848, (Cir.Ct. N.D.Cal. 1887), found that in order to satisfy the Sixth Amendment, Congress promulgated statutes requiring crimes committed prior to redistricting to be prosecuted as if the redistricting had not occurred. See

Beard at 325 and Hackett at 849. The Eleventh Circuit rejected these formulations of the "as previously ascertained" clause.

The clause could have no meaning other than to prohibit Congress from making retroactive changes in judicial districts and transferring the situs of a prosecution once the offense has already been committed. The Eleventh Circuit's interpretation essentially renders the clause meaningless, excess verbiage in an otherwise carefully drafted Amendment. Furthermore, if the clause does not restrain Congress' ability to transfer offenses occurring in three (3) Florida counties to a new district, the clause would also logically fail to restrain any class of defendants from being transferred to destinations unknown.

Fear of such unbridled discretion is precisely the reason the framers adopted the "as previously ascertained" language in drafting the Sixth Amendment. The framers extended Congress the flexibility to define the judicial districts as necessary so long as the districts were not redefined with respect to past crimes. See Zicarelli, id.

The instant case provides an opportunity to directly confront the meaning of a constitutional provision which this Court has not yet construed. The divergent views of the Eleventh Circuit in the instant case and the Third Circuit in Zicarelli have rendered the effect of the provision confusing and uncertain. This Court should review the Eleventh Circuit's decision in order to answer this important federal question

and provide guidance to both Congress and the federal judiciary for future redistricting efforts.

II. THE ELEVENTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL STATUTORY LAW IN A MANNER WHICH CONFLICTS WITH LONGSTANDING FEDERAL PRECEDENT AND WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

In determining that the amendments to 28 U.S.C. Sec. 89 impliedly repealed the criminal jurisdiction and venue provisions of 18 U.S.C. Sec. 3240 with respect to three (3) small counties in Florida, the Eleventh Circuit Court of Appeals has departed from judicial precedent spanning the last century. While the Eleventh Circuit is the first Court of Appeals to specifically discuss the amendments to 28 U.S.C. Sec. 89 in connection with 18 U.S.C. Sec. 3240, the

Eleventh Circuit is also the only Court of Appeals which would review the provision since the Eleventh Circuit has exclusive purview of cases emanating from the Middle and Southern Districts of Florida. Even though the Eleventh Circuit's decision is the first to construe the newly amended 28 U.S.C. Sec. 89, this Court should grant certiorari review because the decision has reversed the longstanding practice of the federal judiciary and will impact future redistricting schemes.

Until the present case, changes in the federal judicial districts, such as transferring counties and creating new districts, did not apply retroactively to criminal offenses even though charges were filed after the effective date of the change. In 1911, Congress enacted 36

Stat.L. 1103, Judicial Code Sec. 59 (1911), which provided that prosecutions for crimes occurring prior to redistricting would be commenced as if the redistricting had not occurred. This principle is presently embodied in 18 U.S.C. Sec. 3240 and has been reiterated in a litany of cases.

Lewis v. United States, 279 U.S. 63, 49 S.Ct. 257, 73 L.Ed. 615 (1929), this Court's only decision on the issue, has remained unchanged since 1929. In Lewis, this Court found that a federal judicial district had jurisdiction to maintain prosecutions which arose from acts committed within its territory as constituted prior to redistricting. Lewis, U.S. at 70, L.Ed. at 618. The lower federal courts have continuously embraced the Lewis principle with respect

to judicial redistricting plans.

In Mizzell v. Beard, 25 F.2d 324 (N.D.Okla. 1928), the Northern District of Oklahoma dismissed a prosecution which was brought in a new district for offense occurring in the old district for lack of jurisdiction. Likewise, in Mizzell v. Vickery, 36 F.2d 327 (10th Cir. 1929), the Tenth Circuit held that the old district remained empowered to indict and try offenses committed within its original territory as constituted prior to redistricting). Construing the modern statutory provisions before this Court, the Fifth Circuit, in Hayes v. United States, 407 F.2d 189, 190-191 (5th Cir. 1969), found that 18 U.S.C. Sec. 3240 grants an altered district continuing jurisdiction over crimes committed prior to redistricting as if the change had not

occurred. The Eight Circuit, Ninth Circuit and Northern District of California have all concurred in the following cases: Briggs v. White, 32 F.2d 108 (8th Cir. 1929); Westover v. United States, 394 F.2d 164 (9th Cir. 1968); and United States v. Hackett, 29 F. 848 (Cir.Ct.N.D.Cal. 1887). The Eleventh Circuit, in the instant case, appears to be the lone dissenter.

In carving an exception in this case to the historical practice, the Eleventh Circuit found that the amendments to 28 U.S.C. Sec. 89 directly conflicted with 18 U.S.C. Sec. 3240 by requiring prosecutions for all offenses arising from the three (3) Florida counties to be brought in the Middle District of Florida regardless of when the offense was committed. See Appendix A-3. The

appellate court further reasoned that Public Law 100-702, a special law, impliedly repealed 18 U.S.C. Sec. 3240, a general law. See Appendix A-3-4. However, the Eleventh Circuit failed to properly employ principles of statutory interpretation and construction. 28 U.S.C. Sec. 89 as amended and 28 U.S.C. Sec. 3240 are not mutually exclusive. If Congress intended to repeal the longstanding practice embodied in 18 U.S.C. Sec. 3240, Congress would have done so in clear and unambiguous language. See Radzanower v. Touche Ross and Company, 426 U.S. 148, 48 L.Ed.2d 540, 96 S.Ct. 1989 (1979). The Eleventh Circuit has repealed 18 U.S.C. Sec. 3240 in this case, not Congress.

The House and Senate Bills provided in pertinent part:

> PENDING ACTIONS: The amendments made by section 1 [placing Collier, Glades and Hendry Counties in the Middle District] shall apply to any action commenced in the United States District Court for the Middle District of Florida, or in the United States District Court for the Southern District of Florida, on or after the effective date of this Act, and shall not effect any action pending in either such court on such effective date.

See Appendix C-4. H.R. 4452, 100th Cong., 2d Sess. (1988) and S. 2340, 100th Cong., 2d Sess. (1988). The cited provision on "pending actions" does not specify whether the instant criminal action could have been commenced in the Middle District of Florida. Instead, the provision merely states that the amendments were prospective and did not affect actions already pending. With such a broad statement denying the amendments retroactive effect, Congress

could not have intended to provide a new section for determining where to prosecute past crimes.

The express purpose of 18 U.S.C. Sec. 3240 was to abrogate the need for Congress to restate its provisions with each redistricting. See Report of the Special Joint Committee on Revision and Codification of Laws of the United States, S.Rep.No. 388, 61st Cong. 2d Sess. 1 at 27 (1910). Giving Public Law 100-702 retroactive effect for past crimes as the Eleventh Circuit has done, leads to the unconscionable result of establishing a unique jurisdictional system for Florida, unlike the rest of the nation. Accordingly, 18 U.S.C. Sec. 3240 still governs venue and jurisdiction for past offenses for all federal districts, including the three (3)

Florida counties.

Any conflict which may exist does not render the two statutes irreconcilable. Since an intent to supersede the jurisdictional provisions of Title 18 is not readily apparent from Public Law 100-701, the Eleventh Circuit should have opted for a construction which effectuated both statutes and avoided constitutional doubt. See St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 780, 101 S.Ct. 2142, 68 L.Ed.2d 612, 619 (1981). The Sixth Amendment underpinnings of 18 U.S.C. Sec. 3240 were noted in two early federal cases decided near the time the original statute was created. In Mizzell v. Beard, 25 F.2d 324 (N.D.Okla. 1928), the court stated:

> It would seem under the plain language of section 59 of the

> Judicial Code that it was the intention of Congress to leave no doubt as to the proper district for institution and proceeding in prosecutions for past offenses prior to such transfer, and that such prosecutions must be instituted and proceeded with in the same manner as if the act providing for the transfer had never been passed. This construction meets all the requirements of the Sixth Amendment to the Constitution, providing, "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.

Beard at 325. Additionally, in United States v. Hackett, 29 F. 848 (Cir.Ct.N.D.Cal. 1887), the court stated:

> Inasmuch as every offender has a right to be tried by a jury of the district in which the crime was committed, which district shall have been previously ascertained by law, it is plain that a jury of the Northern district could not try an offender who committed a crime while the district comprised the whole state, neither could a jury of the Southern district try him.

Hackett at 849. Thus, the Hackett court reasoned that the original district was granted continuing jurisdiction to prevent the defendant from being discharged for lack of a tribunal. Id. The present statutes could have been read harmoniously to remain consistent with the Sixth Amendment as well as past practice.

In holding that 28 U.S.C. Sec. 89 conferred jurisdiction upon the Middle District of Florida to prosecute crimes committed in the old Southern District, the Eleventh Circuit relied upon a less than clear declaration from Congress to deviate from the traditional redistricting formula. Review by this Court is necessary to correct the Eleventh Circuit's misapplication of the cited statutes and precedents and to

resolve this compelling question of federal judicial procedure.

CONCLUSION

For the reasons discussed above, the Petitioner respectfully requests that this Court grant the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

STEPHEN K. JOHNSON
Attorney at Law
P.O. Box 5279
Gainesville, FL 32602
Counsel of Record

EMMETT M. DONNELLY
Attorney at Law
400 Southgate Office Plaza
5001 West 80th Street
Bloomington, MN 55437

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

WILLIAM JAY LOUWSMA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT OF APPEALS

APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

William Jay LOUWSMA, Defendant-
Appellant.

No. 91-3240

United States Court of Appeals,
Eleventh Circuit

Sept. 2, 1992.

Defendant was convicted in the United States Court for the Middle District of Florida, No. 89-65-CR-FTM-13(C), Lee P. Gagliardi, J., of conspiracy to import in excess of 1,000 kilograms of marijuana, pursuant to guilty plea, preserving right to appeal jurisdiction, and defendant appealed. The Court of Appeals, Roney, Senior Circuit Judge, held that: (1) specific statute transferring county to Middle District of Florida, which provides that

transfer shall apply to any action commenced in District after February 18, 1989, overrides by implication provision of general statute, and (2) statute did not violate rights of defendant under portion of the Sixth Amendment granting defendant the right to a trial in the district wherein the crime was committed, which district shall have been "previously ascertained by law."

Affirmed.

Appeal from the United States District Court for the Middle District of Florida.

Before EDMONDSON, Circuit Judge, and RONEY*, and GIBSON**, Senior Circuit Judges.

---

*See rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

RONEY, Senior Circuit Judge:

The defendant was charged with committing drug offenses in Collier County which was in the Southern District of Florida at the time of the offense but had been transferred to the Middle District of Florida by the time of the indictment. The defendant contends that the Middle District lacked jurisdiction to indict and try him for the offense committed in Collier County, and that such action violated his rights under the Sixth Amendment. He relies on the general statute which provides that whenever a county is transferred from one district to another, prosecutions for offenses committed within that county shall be commenced in the original district as if the county had not been transferred. We hold that the specific

statute which transferred Collier County to the Middle District overrides by implication that provision of the general statue so that the Middle District of Florida did have jurisdiction, and that the commencement of the action in the Middle District did not violate defendant's rights under the Sixth Amendment. We affirm the district court's decision denying the defendant's motion to dismiss.

On September 19, 1989, a federal grand jury in the Middle District of Florida returned an indictment charging defendant William Jay Louwsma, along with a number of other individuals, with four counts of marijuana violations of 21 U.S.C. §§ 841, 846, 952, 963, and 960, and 18 U.S.C. §2. Superseding indictments charging additional

defendants were returned by the grand jury in October 1989 and August 1990.

After the district court denied his motion to dismiss, Louwsma entered a plea of guilty to Count One charging conspiracy to import in excess of 1,000 kilograms of marijuana in violation of 21 U.S.C. § 963, preserving his right to appeal the trial court's jurisdiction. The Government dismissed the remaining counts. On March 6, 1991, Louwsma was sentenced to two years incarceration.

Jurisdiction Issue

[1]Louwsma bases his jurisdictional argument on 18 U.S.C. § 3240, which provides that when a county is transferred from one district to another, prosecutions for offenses within a district prior to transfer shall take place as if such county had not been

transferred.[1] Since the offense with which Louwsma was charged occurred in 1986 in Collier County, which was then in the Southern District of Florida, and redistricting of the Middle and Southern Districts was not effective until February 18, 1989, Section 3240 provides that jurisdiction over the offenses lies

---

1 The statute reads:

> Whenever any new district or division is established, or any county or territory is transferred from one district or division to another district or division, prosecutions for offenses committed within such district, division, county, or territory prior to such transfer, shall be commenced and proceeded with the same as if such new district or division had not been created, or such county or territory had not been transferred, unless the court, upon the application of the defendant, shall order the case to be removed to the new district or division for trial.

18 U.S.C. § 3240 (1985).

solely within the Southern District. See Lewis v. United States, 279 U.S. 63,49 S.Ct. 257, 73 L.Ed. 615 (1929) (considering the defendant's challenge to the jurisdiction of the district court from which the county in which the offense occurred had been transferred under a statute similar to 18 U.S.C. §3240, the Supreme Court found that the original district remained empowered to indict and try offenses which occurred prior to the effective date of the transfer even though the indictment was not returned until after the county had been transferred into the northern district). See also Hayes v. United States, 407 F.2d 189 190-91 (5th Cir. 1969), cert. dismissed, 395 U.S. 972, 89 S.Ct. 2133, 23 L.Ed.2d 777 (1969) (where place of offense is transferred to newly

created district after the commission of the offense, 18 U.S.C. 3240 "empowers an altered district to commence prosecutions after the change for offenses committed within its prior boundaries before alteration" as if the new district had not been created); Mizzell v. Beard, 25 F.2d 324 (N.D.Okla, 1928) (newly created Middle District of Georgia, which encompassed the county in which the offense had been committed, had no jurisdiction over the offense because although the indictment stated that the offense occurred in the Middle District, no such district existed at the time the crime was committed).

Collier County was transferred to the middle District by a special statute, the Judicial Improvements and Access to Justice Act, amending 28 U.S.C. § 89

[note]. This statute provides that the transfer "shall apply to any action commenced in ...the Middle District...after [February 18, 1989]."[2] Thus, under this provision, the federal prosecution of Louwsma's crime in Collier County, commenced after February 18,

---

2 The Act provides:

> (1) The amendments made by this section [transferring Collier, Glades and Hendry Counties to the Middle District of Florida] shall take effect 90 days after the enactment of this title. [Nov. 19, 1988]. (2) The amendments made by subsection (a) [transferring Collier, Glades, and Hendry Counties to the Middle District of Florida] shall apply to any action commenced in the United States District Court for the Middle District of Florida , or in the United States District Court for the Southern District of Florida. on or after the effective date of this title, and shall not affect any action pending in either such court on such effective date. Judicial Improvements and Access to Justice Act, Pub.L. No. 100-702, Title X § 1021 (b). 102 Stat 4642, 4672 (1989).

1989, would properly be brought in the Middle District.

[2]Because 18 U.S.C. § 3240 and 28 U.S.C. § 89 are mutually inconsistent, the conflict must be resolved using general principles of statutory construction. It is a basic principle of statutory construction that a precisely drawn statute dealing with a specific subject controls over a statute covering a more generalized spectrum. Brown v. General Services Administration, 425 U.S. 820, 834-35, 96 S.Ct. 1961, 1968-69, 48 L.Ed.2d 402 (1976). The Supreme Court has stated that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." Morton v. Manacari, 417 U.S. 535, 550-51, 94 S.Ct

2474, 2482-83, 41 L.Ed.2d 290 (1974).

Louwsma first contends that these principles of statutory construction are inapplicable because the two statutory provisions are not inconsistent. Louwsma reads section 89 to pertain only to actions filed and pending as of the date Collier County was transferred to the Middle District of Florida. Were this reading of section 89 correct, there would be no conflict between the two statutes. The clear language of the statute, however, provides otherwise. The amendments to section 89 [note] state that the newly constituted districts apply to "any action commenced...on of after the effective date of the title," clearly requiring prosecution of Louwsma to take place within the district. Pub.L. No. 100-702, Title X, § 1021(b),

102 Stat. 4642, 4672 (1989) (emphasis added). Section 3240, on the other hand, states that prosecutions commenced after the transfer shall be in the old district as if the county had not been transferred to the new district. The statutes are in direct conflict.

Louwsma further contends that even if the two provisions are inconsistent, section 3240 should control because it is more specific than section 89. Louwsma maintains that section 3240 is a special law because it mandated the appropriate jurisdiction in which to prosecute crimes occurring in localities transferred between judicial districts prior to the effective date of the transfer. According to the defendant, section 89 is a general law because it has general application to civil as well as criminal

cases. Therefore, even if the two statutes conflict, Louwsma argues that section 3240 must control because it is the special law.

This argument does not properly reflect the statutes. The amendments to 28 U.S.C. § 89 are specific in nature in that they apply to only three counties in Florida which were transferred from one federal district to another. 18 U.S.C. §3240, on the other hand, is a statute of general application. Before the predecessor provisions to section 3240 were enacted, whenever Congress transferred counties form one district to another, it had to enact a special provision specifying whether the original district or the new district would have jurisdiction over crimes committed before the date of the transfer. Lewis v.

United States, 14 F.2d 369, 370-71 (8th Cir. 1926). To obviate the need for a separate jurisdictional statute for each transfer, Congress enacted the predecessor statute to section 3240. That statute was intended as a general provision which would obviate the special provisions that were previously required each time legislation was enacted to create new districts or alter existing ones. See 45 Cong.Rec.S. 3606 (1910) (remarks of Senator Heyburn).

In passing section 3240, however, Congress did not relinquish its right to decide in the future that certain crimes should be charged in the new district rather than the original district. In 28 U.S.C. § 89(b), Congress exercised its right to differ from the provisions of section 3240 with respect to the transfer

of three Florida counties, thus allowing for the prosecution of crimes in the new rather than the original district.

[3]Louwsma asserts that even if section 89 is the specific statute, a special statute will not override a conflicting general law unless Congress expresses a clear and manifest intention to repeal the general law, citing Radzanower v. Touche Ross and Co., 426 U.S. 148, 96 S.Ct. 1989, 48 L.Ed.2d 540 (1979). Radzanower, however, does not control the issue in this case. Radzanower addressed the effect of the enactment of a general statute on an existing specific statute. The Court in Radzanower merely held that a specific statute is not submerged by a later enacted statute covering a more general spectrum unless a "clear intention

otherwise" can be discerned from the language or the legislative history of the statute, Id. at 153-55, 96 S.Ct at 1992-1994. The Radzanower holding does not pertain to the situation here, i.e., an existing general statute followed by the enactment of specific legislation. Indeed, the guidance provided by the Radzanower Court for instances in which a later enacted specific statute conflicts with existing general law is contrary to defendant's position. The Radzanower Court noted that one of the "well-settled categories of repeals by implication [is] where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one." Id., at 154, 96 S.Ct. at 1993 (quoting Posadas v. National City Bank, 296 U.S. 497, 503,

56 S.Ct. 349, 352, 80 L.Ed. 351 (1936). The Middle District of Florida had jurisdiction over the charges in the Middle District jury indictment of Louwsma.

Sixth Amendment Issue

[4]Louwsma's second argument is that if the Government is permitted to prosecute his offenses in the Middle District of Florida, his Sixth Amendment rights will be violated. The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law...

U.S. CONST. amend. VI. Louwsma contends that this amendment guarantees him the right to be tried in the Southern

District because it existed at the time of the commission of the crime.

A review of the sparse history of the Sixth Amendment is required to provide an understanding of the protection that this clause was designed to give to citizens of the United States. As originally proposed by James Madison, then in the House of Representatives, the Sixth Amendment read, in part as follows:

> The trial of all crimes.... shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites....

Williams v. Florida, 399 U.S. 78, 94, 90 S.Ct. 1893, 1902-03, 26 L.Ed.2d 446 (1970). "[V]icinage' mean[t] neighborhood, and 'vicinage of the jury' meant jury of the neighborhood or, in medieval England, jury of the county."

Id. at 93 n. 35, 90 S.Ct. at 1902 n. 35.

Many of the framers considered the "vicinage" language either too vague or too strict. In place of "vicinage", the Conference Committee agreed on an amendment which referred to the "district" in which the crime was committed. Id. at 96, 90 S.Ct. at 1903. It was apparently understood that the districts mentioned in the amendment would be defined by Congress in the Judiciary Act, which was pending while the amendments were being debated. Zicarelli v. Dietz, 633 F.2d 312, 325 (3rd Cir. 1980) cert. denied, 449 U.S. 1083, 101 S.Ct. 868, 66 L.Ed.2d 807 (1981).

The intended meaning of the "previously ascertained by law" clause of the Sixth Amendment is unclear. This

clause is not discussed specifically in the records of the framers nor has it been subject to significant scrutiny by the courts. The language may have been included to ensure that Congress would not change a district specifically to affect the outcome of a given vase. In Zicarelli v. Dietz, the Unites States Court of Appeals for the Third Circuit suggested that the clause may have been included so that Congress could not arbitrarily redefine a district so as to meet the circumstances of a particular criminal case. 633 F.2d at 323. The Zicarelli court was analyzing the meaning of the "previously ascertained by law" clause to determine whether it was a fundamental right such that it would be applicable to the states through the due process clause of the Fourteenth

Amendment. Id. at 320. The court concluded that the clause does not apply to state criminal trials so as to prohibit transfer, upon request of the attorney general, of a defendant's trial to a county in which the crime had not been committed. The Zicarelli court admits, however, that this conclusion is speculative. Louwsma argues unpersuasively that Zicarelli also may be read for the broader proposition that the clause prohibits Congress from transferring the cite of a crime between districts after the commission of the offense. The only other cases cited by the defendant are unpersuasive because they address the "previously ascertained by law" clause in the context of a newly created district court which was not in existence at all at the time of the

offense. See Mizzell v. Beard, 25 F.2d 324 (N.D.Okla. 1928); United States v. Hackett, 29 F. 848 (Cir.Ct.N.D.Cal.1887).

The Government asserts that the clause was intended to ensure that Congress would not change a district specifically to affect the outcome of a given case, just as bills of attainder are prohibited by the Constitution. The Government has cited to no cases offering support for its interpretation of the clause.

As in Williams v. Florida, the inability to divine the intent of the framers requires that in determining what is meant by "previously ascertained by law" we must turn to other than purely historical considerations. 399 U.S. at 98-102, 90 S.Ct. at 1904-07; see also Apodaca v. Oregon, 406 U.S. 404, 92 S.Ct.

1628, 32 L.Ed.2d 184 (1972). The inquiry must focus upon the function served by the jury in contemporary society. The purpose of the jury trial is to "prevent oppression by the Government [by] ... '[p]roviding an accused with the right to be tried by a jury of his peers.'" Williams, 399 U.S. at 100, 90 S.Ct. at 1905 (quoting Duncan v. Louisiana, 391 U.S. 145, 156, 88 S.Ct. 1444, 1451, 20 L.Ed.2d 491 (1968). The Williams Court further noted:

> Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence.

Id.

The purpose of the Sixth Amendment

is not offended by application of 28 U.S.C § 89, placing jurisdiction over Louwsma's case in the Middle District of Florida. Because the county in which Louwsma's crime was committed is now in the newly constituted Middle District of Florida, trial in that district does more to ensure that the defendant is tried by a jury of peers from his community than would have been the case if he were subject to trial in either the newly constituted or the previously constituted Southern District of Florida. In the newly constituted Southern District, none of the jurors would be drawn from the county of the offense. Even in the previously constituted Southern District, a random draw of jurors would probably weigh the jury panel heavily in favor of Dade and Broward Counties in the

southeast section of Florida, the population centers of the Southern District. On the other hand, under the newly constituted Middle District, the jurors would have been drawn from the southwest section of Florida. the general community in which the crime was committed.

Louwsma's Sixth Amendment rights were not violated by Congress' decision to have those crimes which were committed in Collier, Hendry and Glades Counties before February 19, 1989, but which were not charged until after that date, charged and tried in the newly constituted Middle District of Florida.

The Middle District of Florida properly asserted jurisdiction over the crime for which Louwsma was charged.

AFFIRMED

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

88-65-Cr-FtM-13(c)

-against- **ORDER**

MICHAEL JOHN ARNOLD, et al.,

GAGLIARDI, Senior D.J.

The defendant, William Jay Louwsma, has made a motion to dismiss the Second Superseding Indictment for lack of jurisdiction and venue.[1]

The defendant argues that the Middle District of Florida lacked jurisdiction to return the present indictment because

[1] This motion has been adopted by co-defendants, Michael John Arnold and Donald Angus Craig.

the offenses occurred in the Southern District of Florida. The alleged offenses occurred in Collier County, Florida in March and April of 1986. In 1986, Collier County was part of the Southern District of Florida. Effective February 1989, the Judicial Improvements and Access to Justice Act transferred Collier, Glades and Hendry Counties from the Southern District of Florida to the Middle District of Florida. See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, Tit. X, Sec. 1021, 102 Stat. 4642, 4672 (1989). The initial indictment in this case was returned on September 14, 1989.

The defendant's first argument is that the sixth amendment required the indictment to be brought in the Southern District of Florida. However, the

purpose of the sixth amendment was to insure the right to a trial by a jury of the vicinage. Bringing the indictment in the Middle District of Florida insures a jury pool that will consist of jurors, in part, from Collier County, the county in which the crime allegedly occurred. Thus, the defendant's sixth amendment right is not prejudiced, in fact, it is more fully protected by the indictment being brought in the Middle District of Florida.

The defendant's second argument is that 18 U.S.C.A. Sec. 3240 (1985) prohibits the government from bringing the indictment in the Middle District of Florida. Section 3240 provides:

> Whenever any new district or division is established, or any county or territory is transferred from one district or division to another district or division, prosecutions for

> offenses committed within such district, division, county, or territory prior to such transfer, shall be commenced and proceeded with the same as if such new district or division had not been created, or such county or territory had not been transferred, unless the court, upon application of the defendant, shall order the case to be removed to the new district or division for trial.

18 U.S.C.A. Sec. 3240 (1985). It appears that section 3240 requires this action to be brought in the Southern District of Florida. However, public law 100-702 which amended 28 U.S.C. Sec. 89 by including Collier, Glades, and Hendry Counties in the Middle District of Florida states:

> The amendments made by subsection (a) [transferring Collier, Glades, and Hendry Counties to the Middle District] shall apply to any action commenced in the United States District Court for the Middle District of Florida, or in the United States District Court for the Southern District

> of Florida, on or after the effective date of this title, and shall not affect any action pending in either such court on such effective date.

Judicial improvements and Access to Justice Act, Pub. L. No. 100-702, Tit. X, Sec, 1021(b)(2), 102 Stat. 4642, 4672 (1989). Thus, the statute is clear that any actions involving the transferred counties commenced after the effective date of the amendment shall be brought in the Middle District of Florida. Therefore, the defendant's motion to dismiss for lack of jurisdiction and venue is denied.

So. Ordered.

/s/ Gagliardi
Senior U.S.D.J.

DATED: Fort Myers, Florida
December 5, 1990.

TITLE 18 U.S.C. SECTION 3240

Sec. 3240. Creation of new district or division

Whenever any new district or division is established, or any county or territory is transferred from one district or division to another district or division, prosecutions for offenses committed within such district, division, county, or territory prior to such transfer, shall be commenced and proceeded with the same as if such new district or division had not been created, or such county or territory had not been transferred, unless the court, upon application of the defendant, shall order the case to be removed to the new district or division for trial.

TITLE 28 U.S.C. SECTION 89

Sec. 89. Florida

Florida is divided into three judicial districts to be known as the Northern, Middle, and Southern Districts of Florida.

Northern District

(a) The Northern District comprises the counties of Alachua, Bay, Calhoun, Dixie, Escambia, Franklin, Gadsden, Gilchrist, Gulf, Holmes, Jackson, Jefferson, Lafayette, Leon, Levy, Liberty, Madison, Okaloosa, Santa Rosa, Taylor, Wakulla, Walton, and Washington.

Court for the Northern District shall be held at Gainesville, Marianna, Panama City, and Tallahassee.

Middle District

(b) The Middle District comprises the counties of Baker, Bradford, Brevard, Charlotte, Citrus, Clay, Collier, Columbia, De Soto, Duval, Flagler, Glades, Hamilton, Hardee, Hendry, Hernando, Hillsborough, Lake, Lee, Manatee, Marion, Nassau, Orange, Osceola, Pasco, Pinellas, Polk, Putnam, Saint Johns, Sarasota, Seminole, Sumter, Suwannee, Union, and Volusia.

Court for the Middle District shall be held at Fernandina, Fort Myers, Jacksonville, Live Oak, Ocala, Orlando, Saint Petersburg, and Tampa.

(c) The Southern District comprises the counties of Broward, Dade, Highlands, Indian River, Martin, Monroe, Okeechobee, Palm Beach, Saint Lucie.

Court for the Southern District shall be held at Fort Lauderdale, Fort Pierce, Key West, Miami, and West Palm Beach.

100th CONGRESS
2D Session

H.R. 4452

To amend title 28, United States Code, with respect to the configuration of the Middle and Southern Districts of Florida.

IN THE HOUSE OF REPRESENTATIVES

April 25, 1988

Mr. LEWIS of Florida (for himself and Mr. MACK) introducing the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend title 28, United States Code, with respect to the configuration of the Middle and Southern Districts of Florida.

[Line Numbering Omitted]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. MIDDLE AND SOUTHERN DISTRICTS OF FLORIDA.

Section 89 of title 28, United

States Code, is amended -

(1) in subsection (b) -

(A) by inserting "Collier," after "Clay,";

(B) by inserting "Glades," after "Flagler,";

and

(C) by inserting "Hendry," after "Hardee,"

and

(2) in subsection (c) by striking "Collier," "Glades," and "Hendry,".

SECTION 2, EFFECTIVE DATE.

(a) IN GENERAL. - The Amendments made by this Act shall take effect 90 days after the date of enactment of this Act.

(b) PENDING ACTIONS. - The Amendments made by section 1 shall apply to any action commenced in the United

States District Court for the Middle District of Florida, or in the United States District Court for the Southern District of Florida, on or after the effective date of this Act, and shall not affect any action pending in either such court on such effective date.

(c) JURIES. - The amendments made by this Act shall not affect the composition, or preclude the service, of any grand or petit jury summoned, empaneld, or actually serving on the effective date of this Act.

100th CONGRESS
2D Session

S. 2340

To amend title 28, United States Code, with respect to the configuration of the Middle and Southern Districts of Florida.

IN THE SENATE OF THE UNITED STATES

April 28, 1988

Mr. CHILES introducing the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend title 28, United States Code, with respect to the configuration of the Middle and Southern Districts of Florida.

[Line Numbering Omitted]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. MIDDLE AND SOUTHERN DISTRICTS OF FLORIDA.

Section 89 of title 28, United

States Code, is amended -

(1) in subsection (b) -

(A) by inserting "Collier," after "Clay,";

(B) by inserting "Glades," after "Flagler,";

and

(C) by inserting "Hendry," after "Hardee,"

and

(2) in subsection (c) by striking "Collier," "Glades," and "Hendry,".

SECTION 2, EFFECTIVE DATE.

(a) IN GENERAL. - The Amendments made by this Act shall take effect 90 days after the date of enactment of this Act.

(b) PENDING ACTIONS. - The Amendments made by section 1 shall apply to any action commenced in the United

States District Court for the Middle District of Florida, or in the United States District Court for the Southern District of Florida, on or after the effective date of this Act, and shall not affect any action pending in either such court on such effective date.

(c) JURIES. - The amendments made by this Act shall not affect the composition, or preclude the service, of any grand or petit jury summoned, empaneld, or actually serving on the effective date of this Act.